APPEAL NO. 030859
FILED MAY 12, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on March 19, 2003. The hearing officer determined that the respondent's (claimant) injury did not occur while he was in a state of intoxication and therefore, the appellant (carrier) is not relieved of liability.

The carrier appeals, speculating that because the claimant was crying while his statement was being taken and refused to sign a medical authorization, it proved that the claimant's testimony was not credible. The claimant responds urging affirmance.

DECISION

Affirmed.

The claimant, a scaffold builder, fell 15 or 20 feet off a scaffold on _____. The claimant was taken to a hospital and a urine drug screen showed "positive for cannabinoid." The report went on to state, "this is a toxicology screening test only.… If confirmatory testing by more sensitive and specific methods is needed, a comprehensive toxicology screen….should be ordered." For whatever reason, no other confirmatory or quantitative testing was done. The claimant admitted sharing a marijuana cigarette with two other individuals on the prior Saturday (four days prior to the injury).

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication in Section 401.013(a) includes the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. The law presumes that a claimant is sober at the time of an injury. *See* Texas Workers' Compensation Commission Appeal No. 94247, decided on April 12, 1994. However, a carrier may rebut the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19,1991. Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. *Id.*

In this case, the hearing officer commented that the positive drug test shifted the burden of proof to the claimant to show that he was sober at the time of his accident. Although we find that statement problematical, given the lack of any quantitative levels, (*see* Texas Workers' Compensation Commission Appeal No. 011313, decided on July 30, 2001), the hearing officer's determination that the claimant was not intoxicated is supported by the evidence. The carrier argues that because the claimant "broke down in tears" when he gave his recorded statement and refused to give a medical

authorization affected the claimant's credibility and that the claimant had not met his burden of proving that he was not intoxicated at the time of the accident. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Also, in evidence is an affidavit from a coworker that the claimant was not intoxicated at the time of the accident and the hospital records do not indicate the claimant was intoxicated.

For the reasons stated, we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN INTERSTATE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

STEVE ROPER
1616 SOUTH CHESTNUT STREET
LUFKIN, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Margaret L. Turner
Appeals Judge